

**IN THE UNITED STATES MILITARY COMMISSION
AT GUANTANAMO BAY NAVAL BASE, CUBA**

UNITED STATES OF AMERICA

v

IBRAHIM AHMED MAHMOUD AL QOSI

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**DEFENSE MOTION TO
COMPEL DISCOVERY¹**

Fundamental fairness, at even the most basic level, requires access to evidence sufficiently in advance of trial to allow an accused's counsel time to prepare to meet the charges. Developing Commission law requires this, and established military law has long done so. Currently, the Government is denying Mr. Al Qosi discovery of the information he needs to defend himself at his upcoming trial. We request that the Commission take steps to remedy this deficiency.

FACTS

1. In December 2001, Mr. al Qosi was detained in [REDACTED] and shortly thereafter transferred to the control of United States' authorities. Since early 2002, he has been detained at Guantanamo Bay, Cuba pursuant to presidential order,² undergoing numerous interrogation sessions.
2. On 10 and 20 February 2004, soon after the Government allowed him counsel, Mr. al Qosi's defense counsel requested discovery from the Government in anticipation of future criminal charges.³ On 23 March 2004, the Government provided the Defense with an 118-page packet of documents, consisting of purported summaries of interrogations of Mr. al Qosi and others.
3. On 28 June 2004, the Government referred a charge of conspiracy against Mr. al Qosi, and the Commission first convened to consider the case on 27 August 2004. On 7 September 2004, the Government provided the Defense a 270-page packet of documents, primarily consisting of purported summaries of interrogations of another detainee and general, historical material regarding Usama Bin Laden. While both this and the 23 March packages were indexed, they were not point-for-point responsive to the Defense requests of 10 and 20 February 2004.

¹ **TIMING:** This motion is timely filed, the Defense having given notice of its intent to file the same on 15 September 2004. **REQUESTED RELIEF:** The Defense requests the relief sought in paragraph 15, *infra*.

² See Presidents Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2002)(hereinafter "PMO, 13 Nov 02").

³ See Attachments A and B (10 Feb 04 Request for Discovery and 20 Feb 04 Supplement Request for Discovery)

4. On 13 September 2004, the Defense sent to the Government a "Follow up to Defense Discovery Requests."⁴ As of today, the Government has not responded to the 13 September 2004 request or provided any additional discovery. As of today, the Government has only provided information that is only partially responsive to request 1a, 1b, 1u, 1s, and 1v of the 10 February 2004 Request for Discovery and 1a of the 20 February 2004 Supplemental Request for Discovery. In sum, the Defense has yet to receive a list of witnesses the Government may call in findings or sentencing, Jencks Act material for these witnesses as well as agreements with them regarding their potential testimony, lists of potential documentary evidence, or any information about Mr. al Qosi's "pre-trial" detention either in Afghanistan or at Guantanamo Bay.

LAW

5. Commission Law: The President has ordered that these Military Commissions be run to, at a minimum, provide for "a full and fair trial."⁵ Department of Defense Military Commission Order No.1 (21 March 2002) provides that "[t]he Prosecution shall provide the Defense with access to evidence the Prosecution intends to introduce at trial and with access to evidence known to the Prosecution that tends to exculpate the Accused." The Orders further provide that, at a minimum, evidence (including names and contact information for witnesses) and motions shall be provided to the opposing party one week prior "to the scheduled convening of a military commission."⁶ Further, the Commission has the power to "[r]equire the production of documents and other evidentiary materials."⁷

6. Commission law is otherwise silent as to the timing of discovery and the remedy for non-compliance with discovery obligations. Military law, however, is not.

7. Military Law: In fact, the military justice system has always been a leader with respect to early discovery; discovery that is "open, broad, liberal, and generous."⁸ As such, the military has always provided greater rights to pre-trial discovery than are constitutionally required or provided to civilian defendants.⁹ This broad right to pre-trial discovery is "essential to the administration of military justice," because "assembling the military judge, counsel, members, accused, and witnesses is frequently costly and time-consuming, clarification or resolution of matters before trial is essential."¹⁰

8. Article 46, Uniform Code of Military Justice [UCMJ]¹¹ and Rules for Courts-Martial [RCM] 701 govern discovery in the military. Article 46 provides that "the trial counsel,

⁴ See Attachment C (13 Sept 04 Follow up to Defense Discovery Requests).

⁵ PMO, 13 Nov 01 at §4(c)(2).

⁶ MCO No. 8, ¶6 (Disclosures).

⁷ MCO No. 1, ¶6A(5) (Issuance and Service of Process, Obtaining Evidence)

⁸ *United States v. Pomarleanu*, 57 M.J. 351, 359 (C.A.A.F. 2002)(quoting *United States v. Williams*, 50 M.J. 436, 439 (C.A.A.F. 1999)); *United States v. Guthrie*, 53 M.J. 103, 105 (C.A.A.F. 2000).

⁹ See *United States v. Kinney*, 56 M.J. 156 (C.A.A.F. 2001); *United States v. Modesto*, 43 M.J. 315, 320-321 (C.A.A.F., 1995).

¹⁰ Drafters' Analysis of RCM 701, Manual for Courts-Martial (2002 ed.) at Appendix 21 at A21-32.

¹¹ 10 U.S.C. § 846.

the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe.”

9. These regulations are embodied in RCM 701, which is generally “intended to promote full discovery to the maximum extent possible consistent with legitimate needs for nondisclosure . . . and to eliminate ‘gamesmanship’ from the discovery process.”¹² Further:

Providing broad discovery at an early stage reduces pretrial motion practice and surprise and delay at trial. It leads to better informed judgment about the merits of the case and encourages early decisions concerning withdrawal of charges, motions, pleas, and composition of court-martial. In short, experience has shown that broad discovery contributes substantially to the truth-finding process and the efficiency with which it functions.¹³

10. It is axiomatic that the prosecution must comply with applicable rules and procedures governing the production and presentation of evidence at trial.¹⁴ One of the hallmarks of any justice system is the “special role played by the . . . prosecutor in the search for truth in criminal trials.”¹⁵ That role requires the prosecutor, the Government, to exercise due diligence in reviewing not only the evidence in that prosecutor’s possession, but also that in the possession, control, or custody of other government authorities.¹⁶ In *United States v. Williams*,¹⁷ the Court of Appeals for the Armed Forces [CAAF] held that this “due diligence” encompasses three types of files:

- (1) files of law enforcement authorities that have participated in the investigation of the subject matter of the charged offenses;
- (2) investigative files in a related case maintained by an entity closely aligned with the prosecution; and
- (3) other files, as designated in a defense discovery request, that involve a specified type of information within a specified entity.

Along these lines, military courts have also long held that an investigator’s notes of the type known as “case activity notes” or “agent activity summaries” are files subject to discovery.¹⁸

11. Remedy: Both civilian and military courts possess the statutory authority to impose sanctions for noncompliance with discovery requirements, ranging from an order permitting discovery to an order prohibiting the offending party from offering evidence

¹² Drafters’ Analysis of RCM 701, Manual for Courts-Martial (2002 ed.) Appendix 21 at A21-32.

¹³ Drafters’ Analysis of RCM 701, Manual for Courts-Martial (2002 ed.) Appendix 21 at A21-32.

¹⁴ *Williams v. Florida*, 399 U.S. 78, 82, 26 L. Ed. 2d 446, 90 S. Ct. 1893 (1970) (trial “is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played”).

¹⁵ *Strickler v. Green*, 527 U.S. 263, 281 (1999).

¹⁶ See *United States v. Kinney*, 56 M.J. 156 (C.A.A.F. 2001) (*United States v. Williams*, 50 M.J. 436, 441 (C.A.A.F. 1999)).

¹⁷ 50 M.J. at 441.

¹⁸ *United States v. Dixon*, 7 M.J. 556, 557 (C.M.R., 1979).

not disclosed.¹⁹ In the military justice system, RCM 701(g)(3) governs the sanctioning of discovery violations. The rule states:

Failure to comply. If at any time during the court-martial it is brought to the attention of the military judge that a party has failed to comply with this rule, the military judge may take one or more of the following actions:

- (A) Order the party to permit discovery;
- (B) Grant a continuance;
- (C) Prohibit the party from introducing evidence, calling a witness, or raising a defense not disclosed; and
- (D) Enter such other order as is just under the circumstances.

ARGUMENT

12. It hopefully is beyond dispute that the Defense needs, and is entitled to, responsive discovery sufficiently in advance of trial in order to adequately prepare for it. Mr. al Qosi has not received that discovery. The Government's failure to provide "open, broad, liberal, and generous" discovery, as they would be expected to do in the run-of-the-mill court-martial, places Mr. al Qosi's right to a "full and fair trial" into serious jeopardy.

13. For approaching three years, Mr. al Qosi has been a prisoner at Guantanamo Bay, subject to intense and severe interrogation. Since February 2004, Mr. al Qosi's defense counsels have sought, without success, to obtain information basic to the preparation of his defense. Three months after referring charges (28 June 2004), and two months before those charges were scheduled to proceed to trial (7 December 2004), the Government has failed to provide even the bulk of the documents that they most likely relied on to fashion the charge (conspiracy) and the "overt acts" that allegedly support that charge—the information the Defense has consistently been requesting.

14. The requested information is pivotal to ensuring Mr. al Qosi receives strong legal representation. Just as the broad right to pre-trial discovery is "essential to the administration of military justice," it is essential to the administration of Commission justice. Without adequate pre-trial discovery, Mr. al Qosi loses the right to a "full and fair trial," and the Commission loses credibility.

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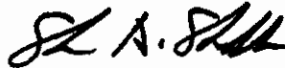
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¹⁹ See, e.g., Fed.R.Crim.P. 12.1(d), 12.2(d), 16(d)(2); RCM 701(g)(3).

REQUESTED RELIEF

15. The Defense requests that the Presiding Officer enter an order requiring the Government to produce the requested information by a date certain.



SHARON A. SHAFFER, Lt Col, USAF
Defense Counsel



BRIAN M. THOMPSON, Capt, USAF
Assistant Defense Counsel

Atchs:

- A. 10 Feb 04 Request for Discovery
- B. 20 Feb 04 Supplement Request for Discovery
- C. 13 Sept 04 Follow up to Defense Discovery Requests

CERTIFICATE OF SERVICE

I hereby certify that on 17 Sept 2004, I sent this Defense Motion to Compel Discovery to the Presiding Officer and the legal assistant to the Presiding Officer via e-mail and hand-delivered a copy to the prosecutor.


BRIAN M. THOMPSON, Capt, USAF
Assistant Defense Counsel



**DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
OFFICE OF MILITARY COMMISSIONS**

February 10, 2004

MEMORANDUM FOR THE OFFICE OF THE CHIEF PROSECUTOR [REDACTED]

FROM: Lt Colonel Sharon A Shaffer

SUBJECT: Request for Discovery-United States v al Qosi

1. Pursuant to the President's Military Order of 13 November 2001 - Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, and Military Commission Order (MCO) Number 1, Section 5, paragraphs A, E, and L, dated 21 March 2002, the Defense in the above-styled case requests the Prosecution provide the following:

- a. Any handwritten, typed, or recorded statements by the Accused or any other potential witness in connection with the investigation of this case, to include summaries of conversations with representatives of the Government.
- b. A copy of any prospective charges in English and in Sudanese Arabic (MCO No. 1, paragraph 5A, dated 21 March 2002)
- c. Any writing or document used by a witness to prepare for trial.
- d. The names of all Government investigators, interrogators, translators, and informants, if any, who have participated in or are presently participating in the investigation of this case.
- e. All personal or business notes, memoranda, e-mails, and writings prepared by investigators in this case, which are not furnished pursuant to any other provisions of this request, which directly or indirectly mentions or pertains to the accused or any government witnesses or which is otherwise relevant to this case. This includes but is not limited to:
 - (1) Any statements or reports, which may later become discoverable under the Jenck's Act 18 U.S.C. 3500.
 - (2) Agent's notes;
 - (3) Internal data pages;
 - (4) Interview logs and logs of all visitors of the accused while detained at Guantanamo Bay, Cuba;
 - (5) Informant's notes;

(6) All messages and other documents used to communicate between the various levels of investigators, including staff summary sheets or memoranda sent to DoD and its staff to keep investigators appraised of the situation or operation;

f. Disclosure of the existence of, and the opportunity to listen to, any and all tapes, audio or video, made by and/or between any and all parties involved in this case, including those which may later become discoverable under the Jenck's Act, 18 U.S.C. 3500.

g. Disclosure of all evidence seized from the person or property of the Accused, or believed to be owned by the Accused, that the Prosecution intends to offer into evidence against the Accused at trial.

h. Any matter the Prosecution seeks to have judicially noticed.

i. The names, locations, and phone numbers, including business addresses, of all witnesses and potential witnesses used in developing the case against the Accused, including any potential rebuttal case.

j. A written list of documents and other items of all evidence (and their locations) the Prosecution intends to use at findings or sentencing, including the rebuttal cases of both.

k. Access to any physical evidence in the custody or control of the Government that was seized, recorded, or otherwise considered, during the investigation of this case, whether or not the Government relied upon it.

l. Any video, photographs or other records of physical evidence similarly uncovered by the Government, whether or not the physical evidence itself is now in the Government's custody or control.

m. Any known evidence tending to diminish the credibility of the Accused and all potential witnesses including, but not limited to, prior civilian or military convictions and evidence of other character, conduct, or bias bearing on witness credibility.

n. Any information concerning places where the accused was detained prior to arriving at Guantanamo Bay Naval Base, Cuba. Specifically, I request all information related to how the accused was transported, vessels used to transport the accused, and the length of detention on any said vessels.

o. Disclosure of any immunity or leniency granted to a witness or to potential witnesses.

p. Access to all relevant personnel, medical and mental health records of all potential witnesses who may testify against the Accused on the merits or in sentencing.

q. Copies of any results of scientific reports or experiments which are within the possession, custody, or control of the Government; the existence of which are known by the Prosecution; or

by the exercise of due diligence may be known; and which are material to the preparation of the Defense, or are intended for use by the Government as evidence at trial.

r. Any and all information concerning the Behavioral Science Consultation Team, to include the number of members assigned, specific identities and educational background of each member, and the protocols/techniques utilized in training interrogators on conducting actual interrogations.

s. Access to pertinent background information of the prospective commission members, to include any and all data, including electronic data, related to the Appointing Authority's selection of commission members and the criteria used in their selection. This request includes any and all data concerning interviews conducted in relation to the selection of commission members.

t. Access to pertinent background information of the prospective Review Panel members, to include any and all data, including electronic data, related to their selection and the criteria used in their selection. This request includes any and all data concerning interviews conducted in relation to the selection of Review Panel members.

u. Access to pertinent background information of the prospective Presiding Officers, to include any and all data, including electronic data, related to their selection and the criteria used in their selection. This request includes any and all data concerning interviews conducted in relation to the selection of Presiding Officers.

v. A copy of any existing rules of court or drafts of prospective rules of court to be utilized in any commission proceedings. (Military Commission Instruction (MCI) No. 5, Annex B, paragraph II, dated 5 February 2004)

w. Notice of any intent to monitor conversations between defense counsel and the accused and the circumstances surrounding the decision to engage in said monitoring. (MCO No. 3, paragraph 4B, dated 5 February 2004)

x. Any and all information, correspondence, or email traffic concerning any promises, concessions, agreements or understandings made by officials of the United States Government with officials of the Republic of the Sudan.

y. Any and all information, correspondence, or email traffic concerning any promises, concessions, concerns, agreements or understandings made by officials of the United States Government with representatives of the International Committee of the Red Cross related to detainee health conditions and/or conditions of confinement at Guantanamo Bay Naval Base, Cuba.

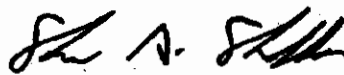
z. A copy of the trial guide (script) to be used in any prospective commission proceedings.

aa. A copy of the rules of professional responsibility for the Defense Legal Services Agency

(DLSA), as provided for in Department of Defense Directive (DODD) 5145.4, paragraph 4.6, dated 15 December 1989.

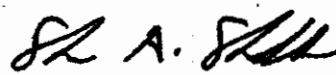
bb. Any other evidence in the possession of the Government or otherwise known to the Prosecution, which reasonably may tend to:

- (1) negate the guilt of the Accused;
 - (2) reduce the guilt of the Accused to any offenses charged; or
 - (3) reduce the potential punishment.
2. The Defense is making this request on the grounds that the Accused cannot properly prepare for the trial of this matter without production and inspection of the documents and items requested. The disclosure of the items requested is paramount to ensure a "full and fair trial" as mandated in the Presidential Order of 13 November 2001 and MCO No. 1, dated 21 March 2002.
3. The Defense requests that the Prosecution inform the Defense Counsel in writing if it does not intend to comply with any of the provisions of this request.
4. The Defense expects that the Prosecution will make reasonably diligent efforts to comply with this request; and, as to any particular requested information, the Defense will regard any non-response or response without comment as an affirmative assertion by the Government that the requested information does not exist.
5. This is, of course, a continuing request, and as such, this request includes any information that the Prosecution may later discover before, during, or after the trial of this case.


SHARON A. SHAFFER, Lt Colonel, USAF
Deputy Chief Defense Counsel
Office of Military Commissions

CERTIFICATE OF SERVICE

I hereby certify that I hand-delivered the original of this discovery request to the Office of the Chief Prosecutor [REDACTED] on 10 February 2004.


SHARON A. SHAFFER, Lt Colonel, USAF
Deputy Chief Defense Counsel
Office of Military Commissions



**DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
OFFICE OF MILITARY COMMISSIONS**

February 20, 2004

MEMORANDUM FOR THE OFFICE OF THE CHIEF PROSECUTOR ([REDACTED])

FROM: Lt Colonel Sharon A. Shaffer

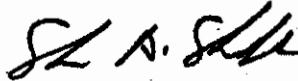
SUBJECT: Supplemental Request for Discovery-United States v Ibrahim Ahmed Mahmoud al Qosi

1. Pursuant to the President's Military Order of 13 November 2001 – Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, and Military Commission Order (MCO) Number 1, Section 5, paragraphs A, E, and L, dated 21 March 2002, as a supplement to the request for discovery dated 10 February 2004, the Defense in the above-styled case requests the Prosecution provide the following:

- a. A copy of any pretrial advice prepared in the forwarding of charges to the Appointing Authority in the case of the Accused.
 - b. Notice of any intent on the part of the Government to pursue the death penalty in any commission proceeding against the Accused.
 - c. A copy of any and all personal or business notes, memoranda, e-mails, writings, recommendations, reports, witness statements, and electronic media, concerning all screening processes undertaken with respect to the capture, detention, and transfer of the Accused to Guantanamo Bay Naval Base, Cuba. In making this request, the Defense specifically requests a list of all individuals who took part as members, advisors, intelligence officers and federal law enforcement officials of the field screening team in Afghanistan, the military screening team, the Central Command assessment, and the DOD review of the Accused's transfer to Guantanamo Bay Naval Base, Cuba, and the substance of any notes, writings, etc. relative to the capture and detention of the Accused, the threat posed by him, and his assessed intelligence and law enforcement value.
2. The Defense is making this request on the grounds that the Accused cannot properly prepare for the trial of this matter without production and inspection of the documents and items requested. The disclosure of the items requested is paramount to ensure a "full and fair trial" as mandated in the Presidential Order of 13 November 2001 and MCO No. 1, dated 21 March 2002.
3. The Defense requests that the Prosecution inform the Defense Counsel in writing if it does not intend to comply with any of the provisions of this request.
4. The Defense expects that the Prosecution will make reasonably diligent efforts to comply with this request; and, as to any particular requested information, the Defense will regard any non-

response or response without comment as an affirmative assertion by the Government that the requested information does not exist.

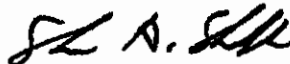
5. This is, of course, a continuing request, and as such, this request includes any information that the Prosecution may later discover before, during, or after the trial of this case.



SHARON A. SHAFFER, Lt Colonel, USAF
Deputy Chief Defense Counsel
Office of Military Commissions

CERTIFICATE OF SERVICE

I hereby certify that I hand-delivered the original of this discovery request to the Office of the Chief Prosecutor [REDACTED] on 20 Feb 2009.



SHARON A. SHAFFER, Lt Colonel, USAF
Deputy Chief Defense Counsel
Office of Military Commissions



DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
OFFICE OF MILITARY COMMISSIONS

13 September 2004

MEMORANDUM FOR THE OFFICE OF THE CHIEF PROSECUTOR [REDACTED]

FROM: Capt Brian M. Thompson

SUBJECT: Follow up to Defense Discovery Requests — United States v al Qosi

1. On 10 and 20 February 2004, we requested that the Government provide us basic information in order for us to prepare for trial in this matter.
2. On 23 March 2004, your office provided us an 118-page packet of documents, consisting of purported summaries of interrogations of our client and others. On 7 September 2004, your office provided us a 270-page packet of documents, primarily consisting of purported summaries of interrogations of another detainee and general, historical material regarding Usama Bin Laden. While both packages were indexed, they were not point-for-point responsive to the requests that we made on 10 and 20 February.
3. In particular, the Government has not provided us with names of witnesses you will or even may call in findings or sentencing, Jencks Act material for these witnesses as well as agreements with them regarding their potential testimony, lists of potential documentary evidence, or any information about our client's "pre-trial" detention either in Afghanistan or at Guantanamo Bay. Even as to the purported summaries of interrogations of our client, we do not have the handwritten notes that likely were made at the time.
4. With trial set to begin 7 December, and with legal hearings scheduled to take on 4 October and early November, our ability to have time to prepare to meet the charges against Mr. al Qosi is severely hampered without prompt and responsive answers to our requests for basic discovery. We request your immediate response advising whether all the documents we requested on 10 and 20 February will be produced: If so, when? If not, why not?
5. Thank you for your prompt attention to this matter. Please contact Lt Col Shaffer or me at 607-1521 with your reply.


BRIAN M. THOMPSON, Capt, USAF
Assistant Detailed Defense Counsel